

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services</b>	)	<b>WT Docket No. 02-381</b>
	)	
<b>2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services</b>	)	<b>WT Docket No. 01-04</b>
	)	
<b>Increasing Flexibility To Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and To Facilitate Capital Formation</b>	)	<b>WT Docket No. 03-202</b>
	)	

**To: The Commission**

**COMMENTS OF RURAL CELLULAR ASSOCIATION**

Rural Cellular Association (“RCA”)<sup>1</sup>, by its attorneys, respectfully submits these Comments in response to the request of the Federal Communications Commission (“FCC” or “Commission”)<sup>2</sup> for comment on matters relevant to the usefulness in rural markets of licensing tools to encourage use of spectrum. The *NPRM* asks whether methods such as a “keep-what-you-use” re-licensing process, may complement existing mechanisms to promote delivery of wireless services to rural areas, and whether it may be appropriate to impose upon spectrum licensees post-renewal performance requirements.

---

1 RCA is an association representing the interests of approximately 100 small and rural wireless licensees providing commercial services to subscribers throughout the nation. Its member companies provide service in more than 135 rural and small metropolitan markets where approximately 14.6 million people reside. RCA was formed in 1993 to address the distinctive issues facing wireless service providers.

2 *Further Notice of Proposed Rulemaking*, WT Docket Nos. 02-381, 01-14 and 03-202, FCC 04-166, released September 27, 2004 (“*NPRM*”).

## **Introduction**

RCA is an association representing the interests of small and rural wireless licensees providing commercial services to subscribers throughout the nation. Member companies provide service in more than 135 rural and small metropolitan markets in the United States. RCA filed comments in response to the Commission's *Notice of Proposed Rulemaking*,<sup>3</sup> which preceded this *Further NPRM*, and in other proceedings relevant to the delivery of wireless services to rural areas. RCA has provided recommendations arising from the concerns of members who provide cellular and/or broadband Personal Communications Services ("PCS") in rural and small markets of the United States. RCA members have a record of providing high quality service in the rural markets they serve, and they have a desire to improve expand service offerings as spectrum becomes available and technology evolves. Rural consumers are entitled to benefit from the same advances in telecommunications that are available in urban areas.

2. RCA offers herein observations and recommendations expressed by its members. RCA supports Commission adoption of a "keep what you use" licensing policy that will return to the public spectrum not utilized by the initial licensee. RCA opposes construction or substantial performance requirements in general, and declines to support the imposition of more rigorous substantial performance construction requirements beyond the initial license term. "Keep what you use licensing," not performance requirements, will most efficiently promote the delivery of wireless services to rural populations.

### **A. The FCC Should Adopt a "Keep What You Use" Licensing Approach**

---

<sup>3</sup> *Notice of Proposed Rulemaking*, WT Docket Nos. 02-381, 01-14 and 03-202, FCC 03-222, released October 6, 2003 ("NPRM").

3. The FCC has questioned whether its policies are working sufficiently to increase access to spectrum in rural areas where it is critically important to promote the rapid provision of broadband and other wireless services in performance of statutory and public interest objectives.<sup>4</sup> RCA submits that adoption of a “keep what you use” approach to spectrum licensing will promote in rural areas access to spectrum by those ready, willing and able to use it. The mechanism should be applied to all terrestrial wireless services and to all future spectrum allocations, nationwide and non-nationwide.

4. Small entities serving rural areas cannot successfully compete at auction for large geographic license areas, yet the large entities that acquire licenses for large geographic areas have not created a record of serving the most rural portions of their license areas.<sup>5</sup> Partitioning, disaggregation and leasing do not meet their potential for delivering wireless services to rural areas. Use of these tools is typically accomplished only on terms mandated by the large company license holder. The terms demanded by the large carrier for a piece of its license reflect the imbalance of market power that favors the large company. The large carrier almost always mandates the type of technology which must be used by the partitionee, disaggregatee or lessee. The small operator also must accept the large carrier’s imposition of complexity in the transaction and the ongoing operating standards, all of which exacerbate the expense for the small company. Roaming rates are specified by the large carrier in a “take it or leave it” fashion because the large carrier has little or nothing to lose if no deal is reached.

5. On the other hand, if licensees were to be faced with losing any portion of a license

---

4 *NPRM*, at para. 151.

5 PCS spectrum licensed by Major Trading Area boundaries is more underutilized in rural areas than is PCS spectrum licensed according to the smaller Basic Trading Areas. RCA has consistently urged the Commission, when

not in use by a date certain, licensees would have far greater incentive to employ the secondary market opportunities which the Commission has created to promote use of spectrum. The competitive pressure would be to maximize the asset by reaching agreements with others for the disposition of spectrum.

6. The “keep what you use” mechanism has worked well in the deployment of cellular radiotelephone services, and it will work well in other wireless services. Rights to use cellular spectrum are never “wasted” because of the “unserved area” licensing rules. Area not served is available for re-licensing. It is a simple approach that deserves repeating. Regulatory obligations attendant to “keep what you use” licensing are minimal, including mainly the filing of a map of served area and some technical backup data.

To apply this concept more broadly, the definition of “served area,” or “used spectrum,” would be determined on a service-by-service basis. They may include the “area served” and “spectrum used” by a lessee, as well as area and use accomplished through deployment of shared infrastructure. As an example of predictable parameters for usage, the area of use of PCS spectrum could be area where the signal strength is between -92 and -104 dBm. A map of contours would be filed by each PCS licensee. Areas identified as “unserved” would be made available for re-licensing to interested parties.

An area may be unserved because the licensee finds no economic justification to construct facilities to serve the area. But what is economically unfeasible for one party may be feasible for another. After an initial, limited construction term, purchased at auction by the first licensee, area should be served as soon investment is justified, not only when the current licensee sees

---

auctioning new blocks of spectrum, to include in the bandplan licenses for small geographic areas.

justification. In other words, economic justification is in the eye of the beholder; one person's stranded investment is another's improved service or expanded subscriber base.

Opponents to the "keep what you use approach" argue that they should not have to choose between conducting uneconomic construction and losing the licensed area.<sup>6</sup> They are placing their own priorities above those of the people who live and work in rural areas. Equity lies with the public. Interests are balanced as long as the licensees have advance notice of the "keep what you use" scenario. Opponents express concern about giving up licenses in rural areas where entry may be justified in the future. If the licensee's interest in developing the areas sharpens in the future it can re-apply for the spectrum. If in the meantime another party has received the spectrum and deployed service, the public is better off having been served sooner.

Furthermore, it is difficult to perceive how a licensee's business plan would be radically altered, as is feared, by loss of spectrum for which the licensee found no use. Nor is the licensee stripped of the ability to use secondary market opportunities; it is merely subjected to a time limit on their availability. The construction term countdown would naturally stimulate licensees' interest in executing arrangements with third parties, probably on more evenly negotiated terms, and sooner rather than later. The construction term would encourage leasing, if the licensee's objective is to maintain a claim of "use" of spectrum, and partitioning/disaggregation if the aim is to realize a return on investment. These agreements will benefit rural consumers who are waiting for improved service and increased competition.

The Commission requests comment on whether "keep what you use" will in fact cause

---

6 *NPRM*, at para. 153.

uneconomic construction.<sup>7</sup> It may, but the FCC has never guaranteed success of any licensee's business plan. The initial licensee will have to make its own calculation as to whether construction is justified for future reward, economic or otherwise. There is no assurance even that a second licensee of yielded spectrum will be successful in cultivating a source of prosperity overlooked or dismissed by the first licensee. The point is that the public will be given a chance to be served.

Concern with undue disruption is one that can be addressed with proper forethought. There is an amount of time that existing licensees can be given to prepare for a demonstration of "use" of spectrum, which will be a final tally of what is represented by the licensee's license. RCA suggests that existing licensees be given at least two years' notice of their deadline to finish building what they want to keep. Applicants for future spectrum licenses will need to know from the start the amount of time they will be given to construct all they are going to construct, and they will gauge their investment in the license accordingly. RCA suggests that new licenses be granted a five year term to build what they want to keep, with additional time allowed if there are incumbents who must vacate the spectrum. Partitionees, disaggregatees and licensees will be subject to the build-out timelines of their predecessor or lessor licensees.

An issue to be considered is whether a licensee's discontinuance of use of spectrum after the build-out period is basis for forfeiture of the license for the service area affected. As an example, FCC Rule Section 22.317, 47 U.S.C. §22.317, applicable to Public Mobile Services, provides that discontinuance of operation must be reported to the Commission by cancellation of the license. Furthermore, "any station that has not provided service to subscribers for 90 continuous days is considered to have been permanently discontinued," unless prior arrangements were made with the

---

<sup>7</sup> *NPRM*, at para. 154.

FCC. A similar provision should be incorporated into the “keep what you use” licensing approach. While a five-year build-out date may lock in the spectrum and area that is to be licensed on a permanent basis, protected area should be lost in relevant part if the licensee ceases operation in part or all of its license area. The license should be cancelled, in whole or in part, and the spectrum made available for re-licensing.

RCA recommends that spectrum to be re-licensed be made available for application on a first-come, first-served basis, with mutually exclusive applications designated for auction. This approach will speed deployment of the spectrum and service to the public.

#### **B. The FCC Should Abandon Substantial Service Performance Requirements**

The Commission questions whether it should strengthen the application of substantial service performance requirements after initial license terms as a means of encouraging use of spectrum in rural areas.<sup>8</sup> RCA submits that neither substantial service nor construction requirements, whether imposed mid-term, end-term or in the second term, function to promote service and construction beyond the minimum requirement. Performance under either criterion is executed in service areas ranked by economic return, and those areas often do not include the rural portions of a market.

Performance and construction requirements are ineffective in promoting competition in rural markets because there is no downside to doing the minimum, to not filling out the market with signal coverage and to not serving rural customers. The requirements diminish incentives for partitioning and disaggregation. It is just as rewarding to do nothing. Rather than go to the trouble of working with third parties to deploy service on fair market terms, the licensee is more easily rewarded by keeping fallow spectrum in rural areas, held on speculation of future usefulness, or in the belief that

---

the market is worth more whole than partitioned. “Keep what you use” licensing would negate this behavior, and should therefore replace performance and construction requirements.

In sum, RCA sees no reason to impose second term performance requirements upon FCC adoption of a “keep what you use” licensing scheme. A “use it or lose it” motivation will always outdo a motivation to meet a regulatory obligation, and it will more accurately reflect a free market.

### **Conclusion**

RCA supports the Commission’s initiative to take up the matter of adopting a “keep what you use” licensing scheme as a means of promoting access to spectrum in rural areas and deployment of wireless services to persons in rural communities. Not only will unused spectrum become available sooner, but the bargaining power of RCA members to achieve meaningful secondary market agreements with large company licensees will be greatly enhanced. RCA encourages the Commission to dispense with the use of minimum construction and substantial service performance requirements, which do not serve the purpose of expanding wireless service into rural areas. RCA looks forward to participating in follow-up proceedings to this NPRM, and to the increased access to spectrum which it expects will be the result.

Respectfully submitted,

**RURAL CELLULAR ASSOCIATION**

*[filed electronically]*

David L. Nace  
Pamela L. Gist

Its Attorneys



Lukas, Nace, Gutierrez & Sachs, Chartered  
1650 Tyson Boulevard, Suite 1500  
McLean, Virginia 22102  
(703) 584-8678

January 13, 2005